STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:
of	:
COMBINED CONTRACT SERVICES, INC.	:DETERMINATION DTA NO. 812826
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1989 through August 31, 1991.	: :

Petitioner, Combined Contract Services, Inc., 218 North Jefferson Street, Room # 100L, Chicago, Illinois 60606-1112, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1989 through August 31, 1991.

Petitioner and the Division of Taxation consented to have the controversy determined on submission without hearing. All documents and briefs were filed by August 15, 1995 which began the six-month statutory period for the issuance of a determination. Petitioner appeared by Robert N. Swetnick, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Brian J. McCann, Esq., of counsel). Upon consideration of all documents and briefs submitted, Jean Corigliano, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Airline Deregulation Act of 1978 (49 USC Appendix § 1301 et seq.) preempts New York State from imposing a sales tax on receipts from the sale of protective and detective services to an airline.

II. Whether, if the sales tax is preempted by Federal law, petitioner is liable for moneys purportedly collected as sales tax but not remitted to the State.

FINDINGS OF FACT

The Division of Taxation ("Division") and petitioner Combined Contract Services, Inc. ("petitioner") executed a stipulation of facts on February 16, 1995. The stipulated facts have been incorporated into this determination.

Petitioner is a corporation with a principal office in Chicago, Illinois. The Division of Taxation ("Division") conducted a sales tax audit of petitioner's business for the period March 1, 1989 through May 31, 1992. The Division requested from petitioner all books and records pertaining to its sales and use tax liability including journals, ledgers, sales invoices, purchase invoices, cash register tapes, Federal income tax returns and exemption certificates. The Division performed a detailed review of all relevant records.

During the audit period, petitioner provided certain services to American Airlines at La Guardia and Kennedy International Airports in New York. These services constituted protective services within the meaning and intent of Tax Law § 1105(c)(8) and Administrative Code of the City of New York § 11-2040(a). A review of petitioner's sales invoices revealed that petitioner had collected sales tax on receipts from the sale of protective services to American Airlines but had not remitted the tax collected to New York State. The amount of the sales tax collected and not remitted is $133,158.94.

The Division issued to petitioner a Notice of Determination, dated February 22, 1993, assessing tax due of $133,158.94 for the period March 1, 1989 through August 31, 1991, plus penalty and interest.

Following a Conciliation Conference, the Division issued a Conciliation Order (CMS No. 130592) to petitioner, dated February 11, 1994, sustaining the Notice of Determination.

Petitioner filed a petition protesting the Notice of Determination on May 10, 1994. The primary defense to the assessment stated in the petition is petitioner's assertion that the activities of its corporate employees "do not constitute security services as envisioned by Section 1105(8) [sic] of the Tax Law". Petitioner expanded on this statement in a bill of particulars which was served in accordance with an order of the Administrative Law Judge issued on January 6, 1995. In its bill, petitioner alleged that the Federal Aviation Act of 1958 preempts the taxation of airline security security services by the states.

CONCLUSIONS OF LAW

A. The primary issue in this case is whether the Airline Deregulation Act of 1978 (49 USC Appendix § 1301 et seq.) ("ADA"), preempts New York State from imposing a sales tax on petitioner's receipts from the sale of security services to American Airlines.[1] Assuming that the

[1]The Airline Deregulation Act of 1978 was re-enacted without substantive change in 1994 (Pub L 103-272, § 1[a]). Citations in this determination are to the law in effect at the time of the assessment, i.e., prior to 1994.

imposition of sales tax is preempted by Federal statute, the second issue is whether Tax Law § 1137(a) requires petitioner to pay over to the State moneys it collected from American Airlines as sales taxes.

B. The disputed tax is provided for by Tax Law § 1105(c)(8) which imposes a tax on the receipts from every sale of the following services:

> "Protective and detective services, including but not limited to, all services provided by or through alarm or protective systems of every nature, including, but not limited to, protection against burglary, theft, fire, water damage or any malfunction of industrial processes or any other malfunction or damage to property or injury to persons, detective agencies, armored car services and guard, patrol and watchman services of every nature other than the performance of such services by a port watchman licensed by the waterfront commission of New York harbor, whether or not tangible personal property is transferred in conjunction therewith."

Prior to 1978, the Federal Aviation Act of 1958 (72 US Stat 731, as amended, 49 USC Appendix § 1301 et seq.) gave the Civil Aeronautics Board authority to regulate interstate air fares, but it did not preempt state regulation. In 1978, Congress determined that efficiency, innovation and low prices would ensue from allowing market forces greater sway in determining rates and services of interstate airlines, and consequently enacted the ADA. To ensure that the states would not undo Federal deregulation through regulations of their own, the ADA included a preemption provision prohibiting the states from enacting or enforcing "any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier" (49 USC Appendix § 1305[a][1]; see, American Airlines v. Wolens, ___ US ___, 130

L Ed 2d 715, 721-722; Morales v. Trans World Airlines, 504 US 374, 119 L Ed 2d 157, 163-164). The ADA also contains a specific provision concerning taxes levied on airline travel. 49 USC Appendix § 1513 states:

> "(a) . . . No State . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom . . . ."
>
> "(b) . . . [N]othing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services. . . ." (Emphasis added.)

Petitioner maintains that the ADA precludes New York State from imposing a sales tax on receipts from its sale of security services to an airline because, according to petitioner, Federal regulation "occupies the entire area of air carrier security" (Petitioner's brief, p. 6). Petitioner characterizes the sales tax in question as an indirect tax "on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation" (49 USC Appendix § 1513[a]), and on that basis, petitioner claims that the tax is preempted by the ADA.

For the following reasons, I find that petitioner's reading of the statute, particularly section 1513, is overly broad and inconsistent with United States Supreme Court precedent.

The first inquiry which must be made in any preemption analysis is whether Congress intended to preempt state law, and where there is no evidence to the contrary, it is presumed that

the state law has not been preempted (Matter of Morgan Guaranty Trust Co. of New York v. Tax Appeals Tribunal, 80 NY2d 44, 587 NYS2d 252, 254).

Subdivision (a) of section 1513 prohibits the states from imposing a tax on persons traveling in air commerce or on receipts from the sale of air transportation. Subdivision (b) of section 1513 allows the states to impose "sales or use taxes on the sale of goods or services" to an airline (49 USC Appendix § 1513[b]). The tax in question is a sales tax on services purchased by American Airlines. As such, it is specifically exempted from the preemption provisions of the Federal statute. This conclusion is consistent with the opinion of the Court in Wardair Canada, Inc. v. Florida Dept. of Revenue (477 US 1, 91 L Ed 2d 1), where the Supreme Court held that a sales tax on aviation fuel sold to airlines was not preempted by section 1513(a). In its opinion, the Court stated: "not only is there no indication that Congress wished to preclude state sales taxation of airline fuel, but, to the contrary, the Act expressly permits States to impose such taxes" (Wardair Canada, Inc. v. Florida Dept. of Revenue (supra, 91 L Ed 2d at 8-9; see also, Air Jamaica Ltd. v. Florida Dept. of Revenue, 374 SO2d 575 cert denied 392 SO 2d 1371 [where the Florida Supreme Court held that Florida's sales tax on packaged meals purchased by the airlines and served to passengers is not preempted by 49 USC Appendix § 1513(a)]).

Petitioner asserts that security services which are "provided by air carriers to their passengers because of a

federal mandate" (Petitioner's reply brief, p. 4) are "part and parcel of the contract of carriage or the sale of transportation" (Petitioner's reply brief, p. 5). Thus, petitioner sees the sales tax on security services as a tax on "persons traveling in air commerce", a tax specifically prohibited by 49 USC Appendix § 1513(a). This is an overly broad reading of the statute which is in conflict with the Supreme Court's decision in Wardair. Under this reading, the states would be precluded from imposing a sales tax on almost every item paid from an airline's receipts, rendering the exemption provisions of section 1513(b) meaningless.

Petitioner argues that a sales tax on security services is distinguishable from a sales tax on aviation fuel, but I can see no rational distinction. Security services are no more closely related to an airline's provision of transportation services than is aviation fuel. As petitioner states, airlines cannot operate without providing security services, but then planes cannot fly without aviation fuel. Since the sales tax imposed by Tax Law 1105(c)(8) has no more than a tangential relationship to the airline's rates, routes and services, it is not prohibited by section 1305(a) or section 1513(a) of the ADA.

Petitioner's reliance on Air Transport Assn. of Am. v. New York State Dept. of Taxation and Fin. (91 AD2d 169, 458 NYS2d 709, affd 59 NY2d 917, 466 NYS2d 319, cert denied 464 US 960, 78 L Ed 2d 336) and Airborne Freight v. New York State Dept. of Taxation and Fin., 137 AD2d 30, 527 NYS2d 107) is mistaken. The issue in both cases was whether taxes imposed under Article 9 of

the Tax Law are preempted by 49 USC Appendix § 1513(a). In Air Transport, the challenged tax was provided for in Tax Law § 184 which imposes a franchise tax on a transportation company's "gross earning from all sources" within New York. The court held that, although denominated a "franchise" tax, the tax imposed by section 184 is a tax on receipts from air transportation and as such is preempted by former § 1113(a) of the Federal Aviation Act (now 49 USC Appendix § 1513[a]). The court also found that the fact that section 184 "imposes a tax on other categories of income does not alter the fact that it imposes a tax upon the gross receipts derived from air carriage" (Air Transport Assn. of Am. v. New York State Dept. of Taxation and Fin., supra, 458 NYS2d at 711). In Airborne Freight v. New York State Dept. of Taxation and Fin. (supra) the court applied the same analysis to a company which provided air transportation of its customer's packages, holding that the tax on gross earnings is a tax on gross receipts from air carriage. The sales tax imposed on petitioner's sales of security services is not a tax, direct or indirect, on the airline's gross receipts or on the persons traveling by air. The mere fact that the tax must be paid from the airline's earnings does not mean that the tax is a tax on airline receipts. Consequently, the holdings in Air Transport and Airborne Freight are not applicable here.

C. Even if state taxation of petitioner's sales receipts is prohibited by Federal law, the Division maintains that Tax Law § 1137(a) makes petitioner liable for all moneys it collected from American Airlines and did not remit to the State. As pertinent,

section 1137(a)(iii) states that every person required to file a sales and use tax return must, at the time of filing that return, pay to the State all moneys collected "purportedly as tax imposed" by article 28 of the Tax Law. Petitioner contends that if the sales tax is preempted by Federal "statute it would be inequitable and unjust to ask it to remit tax moneys it collected to the State. Petitioner urges that its remittance of such moneys would create "an illegal windfall for the State" (Petitioner's brief, p. 10). Petitioner further states:

> "New York should play no role and has no role to play. The parties to the contract for services should be allowed to provide for the return of the funds through their own negotiations, considering a number of factors which are of no interest or concern to the State." (Petitioner's brief, p. 10.)

Petitioner's arguments are without merit. Petitioner acted as a trustee "for and on account of the state" (Tax Law § 1132[a]) in collecting what it purported to be tax moneys from American Airlines. The money collected did not become petitioner's property; rather, it belongs to the State as the only legal beneficiary of the trust. The parties have no right to negotiate between themselves regarding moneys collected as sales tax. American Airlines had every right to believe that the moneys it paid petitioner as sales tax were remitted to the State. The Division's attempt to collect that money does not create a windfall for the State. If American Airlines believed that the State wrongfully imposed the sales tax, it was free to seek a refund of the money it paid to petitioner "within three years after the date <u>when the tax was payable</u> by [petitioner to the Division]" (Tax Law § 1139[a]; emphasis added). Finally, I

fail to see the inequity in asking petitioner to remit to the State moneys it collected as sales tax, plus penalty and interest, inasmuch as petitioner has had the interest-free use of that money for a period of from three to six years.

D. The petition of Combined Contract Services, Inc. is denied, and the Notice of Determination, dated February 22, 1993, is sustained.

DATED: Troy, New York
December 14, 1995

/s/ Jean Corigliano

ADMINISTRATIVE LAW JUDGE